CHELLAPA K KALIMUTHU

v.

SIME UEP PROPERTIES BHD

COURT OF APPEAL, KUALA LUMPUR
MAHADEV SHANKAR JCA
[CIVIL APPEAL NO: B-02-324 OF 1997]
3 JULY 1997

CIVIL PROCEDURE: *Appeal - Interim order - Ex parte application to Court of Appeal - Notice of motion - Previous notice to opponent - Whether necessary - Courts of Judicature Act 1964, ss. 43 & 44 - Rules of the Court of Appeal 1994, rr. 27, 28, 48 & 49 - Erinford injunction pending appeal against order setting aside ex parte injunction - Stay of execution - Real danger of appeal rendered nugatory - Serious question to be tried*

The plaintiff had obtained an *ex parte* injunction restraining the defendant from demolishing a temple, but subsequently, upon the defendant's application, the learned judge set it aside. The plaintiff then applied *ex parte* to the Court of Appeal for an order of stay pending the disposal of his appeal. The issue before the court was whether an appellant may apply to the Court of Appeal for an order without first giving notice to his opponent whose rights are enshrined in an order of the High Court.

Held:
Per Mahadev Shankar JCA

[1] Rule 27(2) of the Rules of the Court of Appeal 1994 ('the RCA') provides that a notice of motion shall be in Form 4 – which specifically provides for notice to the other side. Rule 27(3) of the RCA permits applications only for the shortening of the length of service to be made *ex parte*; it does not permit applications for the substantive order sought to be made *ex parte*. The effect of r. 49 read with r. 27(3) of the RCA is that all orders can generally be made only after notice has been given. However, in contrast to r. 27(3) which requires service of the motion, r. 49 of the RCA merely requires the giving of previous notice. This distinction is the basis for the court to retain the character of an *ex parte* application even though the opposing party, having been given notice, appears and submits its views without prejudicing its right to file a formal application to the full court to set aside any order made. As a result, the instant plaintiff was directed to give notice to the respondent.

[2] The defendant was unable to indicate whether it would be prepared to hold back in the meantime. There was thus a very real danger that the appeal might be rendered nugatory. There was also considerable force in the plaintiff's submission that the injunction was *inter partes* because the 1st defendant had been served and, therefore, the court had no jurisdiction to set it aside. There was also a serious question to be tried, ie, whether the plaintiff had a legitimate interest and expectation which the court should protect. As a result, the injunction must continue to be effective and the order setting it aside had to be stayed until the motion was heard *inter partes* by the full court.

[Plaintiff's application allowed.]

Case(s) referred to:
Bohari Taib v. Pengarah Tanah dan Galian Selangor [1991] 1 CLJ 647 ***(refd)***
Damansara Jaya Sdn Bhd v. Penghuni-Penghuni Kuil Muneswaran Alayam [1994] 1 CLJ 164 ***(refd)***
Erinford Properties Ltd v. Cheshire County Council [1974] 2 All ER 448 ***(refd)***

Legislation referred to:
Courts Enactment of the Laws of the Federated Malay States (Cap 2), s. 15
Courts of Judicature Act 1964, ss. 43, 44, 73
Courts Ordinance 1948, s. 18
Rules of the Court of Appeal 1994, rr. 27, 28, 48, 49
Rules of the High Court 1980, O. 19 r. (1)(2A), O. 29 r. 1(2), O. 32 r. 6
Specific Relief Act 1950, s. 7(1)

Other source(s) referred to:
Interlocutory Injunctions, Tan Woon Tiang & Koh Kok Wah, p 28
Malaysian Court Practice, MLJ, para 32.5.2
Supreme Court Practice 1997 (UK), p 566, para 32/1-6/8

For the appellant - Karpal Singh; M/s Karpal Singh & Co
For the respondent - Karen Goonting; M/s Zaid Ibrahim & Co

[Appeal from High Court, Shah Alam; Civil Suit No: MT1-21-353 of 1996]

Reported by Alex KC Lee

JUDGMENT

Mahadev Shankar JCA:

This is an *ex parte* application for a stay of all proceedings incidental to an order of the High Court at Shah Alam until the finalisation of the appeal therefrom.

On 4 December 1996 the applicant (plaintiff) filed a writ in the Shah Alam High Court. The following averments emerge from the pleadings and affidavits filed in the court below:

(i) The plaintiff is the President of the Executive Committee of the Sri Maha Mariamman Temple (the Temple), Hicom, Shah Alam and is the designated public officer under s. 9(c) of the Societies Act 1961;

(ii) The Temple stands on the land originally comprised in Grant 3576 Lot 30 Mukim Damansara (the land). It was built in 1891 on a part of the land dedicated by its owners for the use of the Hindu employees of Seafield Estate. It has been maintained and used by the Temple devotes ever since to this day. The land was originally an agricultural title;

(iii) On the 12 November 1990 the first defendant Sime U.E.P. Properties Bhd. (Sime) bought the said land from Consolidated Plantations Bhd. Sime's intention was to convert the land to a housing development scheme;

(iv) Consequently the employees of Seafield Estate were retrenched and moved out of the Estate quarters but many of these Hindu families still live in the vicinity and continue to use the Temple;

(v) From May 1992 onwards Sime has sent letters to the plaintiff indicating its intention to demolish the Temple;

(vi) In so deciding Sime did not consult the plaintiff or take the interests of the Temple devotees into account;

(vii) The Temple is a permanent and highly visible structure. Several photographs have been put in showing its size and the ceremonials conducted therein;

(viii) By reason of partial acquisition of part of the land conversion and other developments, the original title to the land has been substituted by a "Suratan Hakmilik Sementara" No. H.S. (d) 104558 for Lot 2925 which comprises the land on which the Temple still stands. It is now zoned for housing development;

(ix) When the application was made for conversion the Selangor Exco had imposed a special condition reading as follows:

> Pemaju dikehendaki memperuntukkan kawasan bagi maksud Sekolah Rendah Jenis Kebangsaan (Tamil) seluas kira-kira 5 ekar dan tapak untuk Kuil Sri Maha Mariamman seluas kira-kira 1 ekar di tempat yang sedia, ada.

(x) Thus it appears that all parties concerned had taken note of the legitimate interests of the Temple devotees and provided for the preservation of the Temple and its grounds;

(xi) A letter to that effect from Dato' M. Mahalingam dated 17th May 1993 is in evidence. He was a member of the Exco when these special conditions were imposed. At the time of the letter he was a Minister in the Federal Government;

(xii) An extract from the letter of the Pengarah Tanah dan Galian dated 1st July 1987 has also been put in. It reads:

> **Kuil Hindu**
>
> Y.A.B. Dato' Menteri Besar Selangor bersetuju membatalkan syarat yang mengkehendaki tuan menguntukkan tanah seluas satu ekar bagi maksud Kuil Hindu dikawasan yang sedia ada.

(xiii) Since the rest of the letter of the Pengarah Tanah dan Galian has not been put in by Sime's solicitors the circumstances in which the Menteri Besar agreed to the cancellation, whether he could unilaterally override the Exco, and whether this agreement in fact resulted in a cancellation are all maters for further inquiry. The plaintiff says the Temple was not consulted;

(xiv) In January 1996 the plaintiff got to know of the approval by the second defendant of a plan showing a hypermarket to be built on the Temple site. The plaintiff objected to the approval;

(xv) As the first defendant appeared to be bent on proceeding with its intention to demolish the temple this action was filed to prevent the frustration of the legitimate interests and expectation of the plaintiff and the Temple devotees.

The legality and respective rights and interests claimed by the parties are all yet to be tested.

Having filed the writ and statement of claim on 4 December 1996, the plaintiff filed a summons-in-chambers on 18 December 1996 for an *ex parte* injunction. He served the summons and affidavit in support on all the defendants the same day.

On 20 December 1996 neither Sime nor its solicitors turned up in Court. The Legal Advisor did so and opposed any order against the second and third defendants. The judge granted the injunction (the injunction) against Sime alone pending the finalisation of the suit.

On 26 December 1996 Sime's solicitors were given notice of the injunction. On 20 January 1997 the plaintiff's solicitors submitted the Draft Order to the senior assistant registrar for approval pending extraction. The plaintiff says it is yet to be returned.

Sime did not appeal against the order made on 20 December 1996. It did not protest about any short service in its letter to the plaintiff's solicitors on 26 December 1996. It took a step in the action by filing its defence on 17 January 1997. There is no reference in this defence to the injunction granted.

On 22 January 1997 Sime filed a summons-in-chambers to set aside the injunction. Lengthy affidavits were filed by both parties. It was heard *inter partes* on 30 June 1997.

Counsel for the applicant Encik Karpal Singh says that the judge based his decision on the sole ground that there was short service on Sime of the original application. The plaintiff was represented by Encik Karpal Singh's junior counsel. Shortly after the decision Encik Karpal Singh says he went to see the High Court judge to obtain an *Erinford* injunction pending an appeal but he was told that the judge had already left for Sabah.

So he came to the Court of Appeal. He filed a Notice of Appeal in the High Court. He also filed a letter addressed to Y.A.A. the President with all the relevant cause papers attached. In it he explained the urgency of the matter because if Sime proceeded to demolish the Temple as he said they were threatening to do, his entire appeal will be rendered nugatory. The letter was not copied to Sime's solicitors. Then he filed this motion, and the affidavits in support. Admittedly the documents are quite voluminous and must have taken strenuous efforts to get ready in so short a time.

When he appeared before me on the morning of 3 July 1997 to argue this application Encik Karpal Singh candidly admitted that he had not informed Sime's solicitors because this was an *ex parte* application filed in circumstances of the gravest urgency.

He said that he was merely following what he understood to be the established practice in the Court of Appeal. He did not provide any precedents.

I directed him to give notice to Sime's solicitors and adjourned the matter to 2pm the same afternoon.

The crux of the matter now is whether an appellant should ever be permitted to come to the Court of Appeal and apply for an order without first giving notice to his opponent whose rights after all are enshrined in a High Court order which would usually only have been made after both parties had been heard in the Court below. An appeal by itself is not to operate as a stay of execution. (Section 73 of the Courts of Judicature Act 1964 – the Act).

Applications of the present kind are provided for by ss. 43 and 44 of the Act which read:

> **43 Applications**
>
> Whenever application may be made either to the High Court of to the [Court of Appeal], it shall be made in the first instance to the High Court.
>
> **44 Incidental directions and interim orders**
>
> (1) In any proceeding pending before the [Court of Appeal] any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the [Court of Appeal].
>
> (2) Every application under subsection (1) shall be deemed to be a proceeding in the [Court of Appeal].
>
> (3) Every order so made may be discharged or varied by the full Court.

Section 44 of the Act is not entirely new. It appeared in the old Courts Enactment of the Laws of the Federated Malay States Cap. 2 as s. 15. It was repeated in the Courts Ordinance No. 43 of 1948 as s. 18.

The key words relevant to the present application are:

> ... any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding ...

The kind of prejudice contemplated which will require interim relief has been aptly summarised in "*Interlocutory Injunctions*" by Tan Woon Tiang and Koh Kok Wah at p. 28. It reads:

> On the principle that an appellant must not be deprived of the results of an appeal, the court may grant an injunction pending appeal to restrain an act which will render the appeal nugatory (see *Orion Property Trust Ltd v. Du Cane Court Ltd* [1962] 3 All ER 466). **Even if an *ex parte* application for an interlocutory injunction is dismissed, the court may nonetheless grant an injunction pending the appeal against dismissal of the application** (see *Erinford Properties Ltd v. Cheshire County Council* [1974] 2 All ER 488; *Dickson Trading (S) Ptd Ltd v. Transmarco Ltd* [1989] 2 MLJ 408; *Tun Datu Haji Mustapha bin Datu Harun v. Tun Datuk Haji Mohamed Adnan Robert* [1986] 2 MLJ 391). Similarly, when the court is discharging an injunction previously granted, it may order that the restraint on the defendant be continued pending appeal against the order to discharge (see *Bryanston Finance Ltd v. de Vries (No 2)* [1976] 1 All ER 25). Such injunctions pending appeal have

been called *Erinford* injunctions after the *Erinford* case *(supra).* An *Erinford* injunction will be granted only where there is a likelihood of a successful appeal being rendered nugatory or if the plaintiff would not be adequately compensated in damages for the temporary damage between the date of hearing and the date when its appeal is heard (*Cocoa Processors Sdn Bhd v. United Malayan Banking Corporation Bhd & Ors (No 2)* [1988] 3 MLJ 497.) The converse of an *Erinford* injunction is a stay of an injunction order granted pending appeal. The court has a discretion to grant an injunction and order a stay pending appeal if that is necessary to ensure that the appeal will not be academic (see *Minnesota Mining Co v. Johnson Ltd* [1976] FST 139; *Kuttikevundaw v. Pentadbir Tanah Daerah Manjung, Lumut* [1990] Nov BLD 1105).

The difficulty here is not the existence of the power, but the correct procedure. As to this r. 27 and 28 of the Court of Appeal Rules 1994 (the Rules) provide:

27 Applications to Court

(1) All applications to the Court shall unless otherwise provided be made by motion and shall be heard **in open court**.

(2) A notice of motion **shall** be substantially in Form 4 in the First Schedule.

(3) Notice of motion shall be served on the parties concerned not less than seven days before, the return day, unless the Court otherwise orders. Applications **for leave** to give shorter notice **may be** made by motion *ex parte.*

(4) Affidavits may be filed, read and used in like manner as upon a motion in High Court.

28 Applications

(1) All applications to the Court pending appeals shall contain in the heading the appeal number allocated pursuant to rule 17 and shall not require any application number.

Rule 27(1), (2) and (3) are all mandatory. Hearings in open court ensures transparency. Form 4 specifically provides for notice to the other side. Indeed the very opening words are a command to "Take notice ...". Rule 27(3) significantly permits applications only for the shortening of the length of service to be made *ex parte*. It does not permit applications for the substantive order sought to be made *ex parte*. The significance of r. 28 is that there must be a pending appeal **before** the application is made. Otherwise it will not have a number.

I now move on to rr. 48 and 49 which read as follows:

48 Application by motion

Where by these Rules any application is authorised to be made to the Court or a Judge, such application, if made to a Judge in Court, shall be made by motion.

49 Where notice of motion to be given

Except where by any order or rule, it may be made *ex parte* in the first instance, no motion shall be made without previous notice to the parties affected thereby. **But** the Court or **a Judge may make any order *ex parte*** upon such terms as to costs or otherwise, and subject to such undertaking, if any, as the Court or Judge may think just; and any party affected by such order may move to set it aside.

It appears to me that the effect of r. 49 read with r. 27(3) is that the general rule is that all orders must be made only after notice has been given. The second part of r. 49 **preserves** the Court's power to make **ANY** order *ex parte* but the scheme of the rules appears to suggest that this is exceptional.

The rule permitting *ex parte* applications in the High Court for injunction orders for the preservation of property and the like is O. 29 r. 1(2). There are stringent provisions as to the supporting material required (see O. 19 r. (1)(2A). There is a reference in O. 32 r. 6 to the power to set an *ex parte* order aside. The full details as to the procedure to be followed can be found in the United Kingdom's Supreme Court Practice 1997 at p. 566 para 32/1-6/8.

In sharp contrast to r. 27(3) which requires **service** of the motion r. 49 of the Court of Appeal Rules merely requires the **giving of previous notice**. This distinction was the basis of my belief that this court could retain the character of an *ex parte* application even though the opposing party having been given notice, appears and submits its views without prejudicing its right to file a formal application to the full court to set aside any order made.

This is what happended in *Erinford Properties Ltd. v. Cheshire C.C.* [1974] 2 All ER 448 where Megarry said:

Ultimately I held that I should grant the injunction in this modified form. Counsel for the county council thereupon acted on an intimation that he had already made and moved *ex parte* to discharge or modify the injunction, primarily on the ground that I had no jurisdiction to grant it, and that only the Court of Appeal could do so. After a brief discussion, I adjoured this motion to the next day so that the authorities could be consulted; and as a result I have heard substantial argument on the point. **Although the county council's motion was *ex parte*, I indicated that I would hear what could be said on behalf of the plaintiffs;** and in the end I had the advantage of an

> argument by junior counsel for the plaintiffs, **so that the motion** of counsel for the county council **became** what in *Pickwick International Inc (GB) Ltd v. Multiple Sound Distributors Ltd* [1972] 3 All ER 384, [1972] 1 WLR 1213 was described as **an opposed *ex parte* motion**.

and later also at p. 449:

> But he said, that when I had held (as I did) that the plaintiffs were not entitled to an injunction, I had no jurisdiction, or alternatively it would be quite wrong, to sit on appeal from myself, as it were, and hold that an injunction should be granted to preserve the *status quo* pending an appeal: the grant of such an injunction would be wholly inconsistent with my decision on the main motion that no injunction should be granted. By refusing an injunction on motion a judge showed that it was not right to preserve the *status quo* pending appeal. He was *functus officio quoad* granting an injunction in that case. The settled practice, counsel asserted (without citing authority), was that if the motion for an injunction failed and the unsuccessful party sought an injunction pending an appeal against the refusal, he should make no application to the judge but should at once take himself to the Court of Appeal and there seek his injunction pending the appeal. Counsel emphasised that apart from the plaintiffs' expression of a probable intention to appeal, nothing new had happened since the refusal of the injunction which would make it proper to grant now, even in a temporary form, what had been refused then.

Acting in line with these authorities I directed Encik Karpal Singh to give notice to Sime's solicitors and adjourned the matter to the afternoon. Cik Karen Goonting appeared for the first respondent. Notwithstanding the severe time constraints she made a most useful submission. I record here my appreciation for her assistance.

I took note that the plaintiff's junior counsel who argued this matter in the court below did not himself apply for the stay immediately after the judge pronounced his order. It is also very possible he did not point out to the judge that the alleged short service was a mere irregularity because Sime took a step in the action by filing its Defence before it applied to set aside. There is also some dispute as to whether the Notice of Appeal was filed on 1 June or the 2 June. Encik Karpal Singh's record shows the court received the documents on the 1st, but the print-out of the praecipe shows the 2 June. The motion however was filed after the appeal was registered and carries the appeal number.

The primary consideration which led me to grant the application for a limited stay till the sitting of the full court is that Cik Goonting was unable to indicate whether Sime would be prepared to hold back in the meantime notwithstanding that the order made on 30 June 1997 had not been extracted. There was thus a very real danger that the appeal may be rendered nugatory. There is also

considerable force in Encik Karpal Singh's submission that the injunction made on 20 December 1996 was *inter partes* because the first defendant had been served. If so, it is arguable that the court had no jurisdiction to set it aside. (But see MLJ's *Malaysian Court Practice* para 32.5.2. and the cases cited. It seems that the order was not perfected if it was still sitting in the Registry.) This Temple has been there since 1891. The Exco and Sime were aware that when conversion was applied for the State Authority had imposed a special condition protecting the status and situation of the temple. There is a serious question to be tried as to whether the plaintiff has a legitimate interest and expectation which this court should protect. I took the liberty of directing the attention of both counsel to my judgment in *Damansara Jaya Sdn. Bhd. v. Penghuni-Penghuni Kuil Muneswaran Alayam* (Shah Alam S.P. 24-27-92). There are many similarities between that case and the problems here. The decision of the Supreme Court in *Bohari bin Taib v. Pengarah Tanah dan Galian, Selangor* [1991] 1 MLJ 343 is not irrelevant. Finally I think it desirable to draw the attention of all concerned to s. 7(1) of the Specific Relief Act 1950, which forbids forcible evictions without a court order.

Accordingly the order of this court is that the injunction made by the High Court on 20 December 1996 will continue effective and the order made on 30 June 1997 will be stayed until this motion is heard *inter partes* by the full court on a date to be fixed. The costs of this application will be costs in the cause.